IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., AND PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I.

The State of New Mexico's injunction is an undue and unreasonable burden on interstate commerce.

A. The cases relied on by appellee are distinguishable from this case.

In support of the injunction issued by the State of New Mexico prohibiting appellants from publishing and broadcasting price advertising of an optometrist residing and practicing in Texas, appellee in its brief (pp. 2-13) places its primary reliance on the following cases: *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Panhandle Co.* v. *Michigan Comm'n.*, 341 U.S. 329 (1951); *Buck* v. *California*, 343 U.S. 99 (1952); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949); *Bedno* v. *Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396 (1959), cert. den. 360 U.S. 931 (1959); and *Ritholz* v. *Indiana State Board of*

Registration, etc., 45 F. Supp. 423 (N.D., Ind., 1937). All of these cases are plainly distinguishable from our case.

In the *Panhandle Eastern* case the Court limited its ruling to the question of federal preemption of interstate sales of natural gas under the Natural Gas Act. It found that the Act applied only to sales for resale to the ultimate consumer, and held that in passing the Act Congress intentionally left direct sales for consumption to state regulation (341 U.S. 329, 334). Relying on its earlier case of *Panhandle Pipe Line Co.* v. *Michigan Comm'n.*, 332 U.S. 507, 516-518 (1947), the Court did not need to determine the effect of the Commerce Clause on the challenged regulation independently of the action taken by Congress in the Natural Gas Act. But no act of Congress specifically sanctions the challenged activity of New Mexico, and the effect of the Commerce Clause on that activity is one of the questions now before the Court.

In the *Railway Express* case, on the other hand, the Court did consider the impact of the Commerce Clause on New York City's proscription of advertising on vehicles using the City's streets, upholding the restriction as valid even though some of the trucks of Railway Express moved in interstate commerce between New York and New Jersey. There is, however, a fundamental distinction between prohibiting trucks using a municipality's streets from carrying advertising, even though they may move in interstate commerce, and prohibiting a newspaper and radio station from publishing and broadcasting price advertising of a Texas optometrist in interstate commerce from a business site located in the State of New Mexico. In the *Railway Express* case the regulation was of local traffic, with an incidental effect on that portion of the traffic that moved between New York and New Jersey, and such regulation was of an advertising media clearly more akin to billboards than to newspapers or radio stations. As to billboards, this Court has held that they may be regulated to the point of prohibition, *Packer Corp.* v. *Utah*, 285 U.S. 105, 109-110 (1932); *Cusack Co.* v. *City of Chicago*, 242

U.S. 526 (1917). This Court has never so held with respect to newspapers[1] or radio stations.

The prohibition applied to appellants here is of a totally different character. The price advertising they have been enjoined from disseminating is of a purely interstate nature and was directed not only to New Mexico residents, who might thereby be induced to travel to Texas to avail themselves of Roberts' services, but also to others residing in Texas who might similarly be induced to avail themselves of Roberts' services.

The basis of the Court's holdings was that in highway cases, where no conflicting federal regulation is involved, local authorities are traditionally given great leeway, and on this point the Court relied on *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 187 (1938) which upheld South Carolina's regulations limiting the size and weight of trucks that could travel on its highways even though this clearly affected interstate commerce.

This Court has never sanctioned similar leeway in a case similar to that of appellants. On the contrary, even in the *Barnwell Brothers* case itself the Court drew important distinctions between the regulation of use of the highways and situations comparable to that of appellants, stating as follows:

> "*State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the*

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[1] Indeed, in the *Packer Corp.* case the Court implicitly recognized that different rules applied as between billboard advertising and advertising by newspapers moving in interstate commerce. Utah had had a general statutory prohibition on tobacco advertising, but this had been held by the Utah Supreme Court to be void under the Commerce Clause as applied to an advertisement of cigarettes manufactured outside of Utah and inserted in a Utah newspaper circulating in other states. *State v. Salt Lake Tribune Publishing Co.*, 68 Utah 87; 249 Pac. 474 (1926). The law was then amended by deleting the proscription on advertising in newspapers, and it was the law as amended that was before the Court in the *Packer Corp.* case. As to the amended law the Court stated:

> "The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the State. Action by a State taken to observe one prohibition of the Constitution does not entail the violation of another." (285 U.S. 105, 109)

state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted." (citing cases). (emphasis added)

. . . .

"Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. (citing cases)" (303 U.S. 177, 184-185, n.2)

Here, the State of New Mexico has undertaken to prevent appellant Head, who publishes a newspaper circulating in interstate commerce,[2] and appellant Permian, which

[2] It should be noted that while the American Optometric Association, Inc. (the "AOA"), in its brief as *amicus curiae*, seeks to minimize the extent of the interstate commerce involved in this case (Brief of AOA, pp. 40-41), the State does not. In addition to the fact that it was the State of New Mexico that initiated this litigation and enjoined appellants, it is clear that this *de minimus* argument is devoid of merit under the circumstances of this case. See *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946); *NLRB v. Fainblatt*, 306 U.S. 601 (1939). In the latter case the Court stated that "The power of Congress to regulate interstate commerce is plenary and extends to all commerce be it great or small. . . ." and that "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication." (306 U.S. 601 at 606). That those cases were concerned with specific regulations of commerce by Congress under the Fair Labor Standards Act and the National Labor Relations Act, respectively, does not make them any less applicable to our case, for the power of Congress over interstate commerce such as here involved is plenary, and one having a single transaction in interstate commerce is surely as entitled to protection from state interference as one having many such transactions. Were the rule otherwise, a state's power to restrain new transactions in interstate commerce would be unlimited, a situation hardly contemplated by the framers of the Commerce Clause and never yet sanctioned by this Court.

Aside from this, there is as much basis in the record for assuming that the interstate commerce involved in this case is extensive as there is for assuming that it is minimal, and if New Mexico is content with the record in this case, the AOA should surely be content also.

broadcasts in interstate commerce, from disseminating price advertising of an optometrist residing and practicing in Texas. New Mexico now admits that its citizens "may travel to Texas to purchase eyeglasses from Roberts" (Brief of Appellee, p. 11). Admitting this, it is clear that the effect, if not the purpose, of New Mexico's action is to gain for New Mexico optometrists the advantage of being free from the competition of a Texas optometrist and that this advantage is to be gained at the expense of Roberts, appellants and the flow of information, goods and persons in interstate commerce. Moreover, appellee's action precludes Texas residents from learning of Roberts' prices and thereby from patronizing Roberts. Roberts and those who use his services thus suffer a disadvantage of the character contemplated in the *Barnwell Brothers* case, as quoted above, and this disadvantage has no conceivable corresponding advantage to persons residing within the State of New Mexico. This is particularly so in light of New Mexico's further admission that "Roberts is free to originate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico." (Brief of Appellee, p. 6). A scheme of regulation having such an effect, we submit, unduly burdens interstate commerce.

B. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 524 (1935) is sound precedent for appellant's position that appellees injunction unduly burdens interstate commerce.

Of equal significance to the above-quoted language from the *Barnwell Brothers* case is the fact that among other cases cited by the Court, in support of the rule set forth in that language, was *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511, 524 (1935). That case, involving an attempt by New York, under the guise of a health statute, to regulate the price paid for milk in Vermont, was fully discussed and quoted at length in appellants' initial brief (pp. 10-11; 15-18), and nothing appellee has stated in its brief in any way detracts from its soundness as authority for appellants' position.

Appellee attempts to distinguish the *Baldwin* case on the ground that there New York was trying to project its

price scheme into Vermont, a form of economic barrier, while here "New Mexico has no concern whatsoever with advertising originating in Texas." (Brief of Appellee, p. 7). Amplifying on this, appellee's brief states, at page 6:

> "Both appellants are New Mexico residents and are amenable to its laws. It is advertising promulgated[3] in New Mexico which is the subject of the injunction. (R. 21). *Roberts is free to originate any kind of advertising in Texas that he may choose, even though subsequently heard or read in New Mexico.* If New Mexico, by any method, sought to control advertising promulgated in Texas, then *Baldwin* would be applicable, but such is not the case here." (emphasis added)

Appellee's distinction as to where the advertising in this case originates is ill founded. While the District Court found that the advertising originates in New Mexico (R. 19), Roberts resides and practices optometry in Texas (R. 18-19). Quite clearly, any advertisement by him must initially originate with him and in Texas, and the District Court's finding obviously means only that appellants' dissemination of this advertising begins in New Mexico, where appellants have their places of business. Roberts' advertising itself originates in Texas just as much as the milk in the *Baldwin* case originated in Vermont, and New Mexico's efforts to control the content of Roberts' advertising are no less a projection of New Mexico's laws regulating optometry into Texas than were New Yorks' efforts to control the price of milk in Vermont.[4] In view of this, Appellee's action is clearly proscribed by the teachings of the *Baldwin* case.

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[3] Actually, appellants were enjoined "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses . . ." (R. 21).

[4] As discussed in appellants' initial brief (pp. 18-19), *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918), involves a similar situation—stock quotations being sent by wire from New York to Massachusetts for decoding and relay by ticker to subscribers. Just as the transmissions there remained in interstate commerce and free from interference by Massachusetts, so here, too, the advertising of Roberts that originates in Texas remains in interstate commerce when it is communicated to appellants for dissemination by them in interstate commerce.

Nor are the other cases relied upon by appellee any more persuasive in support of its position. In the case of *Buck* v. *California*, 343 U.S. 99 (1952), the Court upheld as valid San Diego County's application to drivers picking up passengers in Mexico and driving them across the unincorporated areas of San Diego County, an ordinance requiring taxicab drivers to obtain a permit from the sheriff. In so ruling the Court relied on a line of cases similar to those relied on in the *Railway Express* case, *supra*, such cases holding that a state could impose on those using its highways in interstate commerce an annual license fee, moderate in amount, for the maintenance of its highways. See *Aero Transit Co.* v. *Georgia Comm'n.*, 295 U.S. 285 (1935); *Hicklin* v. *Coney*, 290 U.S. 169 (1933). As already noted, such cases, involving use of the highways, do not support appellee's position. There is a significant difference between regulation of the highways by imposition of a moderate, non-discriminatory license fee to pay for the use of the highways, and the prohibition by New Mexico of price advertising by a Texas optometrist. In addition, Congress had regulated with respect to interstate carriers, but it had deliberately left the regulation of taxicabs to the states as a local matter.

Similarly, the case of *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), is of no different character than the foregoing cases relied on by appellee and affords equally little support for its position. There, against challenges based on asserted federal preemption and an alleged undue burden on interstate commerce, the Court upheld as valid the application of a City of Detroit smoke abatement ordinance to a vessel inspected, approved and licensed by the federal government and trading in interstate commerce. With regard to preemption, the Court concluded that the federal inspection laws were aimed at safety and did not preempt the field of prevention of air pollution, a problem peculiarly a matter of state and local concern (362 U.S. 440, 445-446). As for burdening interstate commerce, the Court found no discrimination against interstate commerce and concluded that "no impermissible burden on commerce has been shown". (448)

However, the regulation in the *Huron* case was of a vessel in Detroit harbor, whereas here New Mexico is projecting its price advertising law beyond New Mexico to Texas for the clear purpose and effect of regulating the advertising of an optometrist residing and practicing in Texas. This distinction negates any suggestion that the *Huron* case controls this case.[5]

Nor do the cases of *Bedno* v. *Fast*, 6 Wis. 2d 471, 95 N.W. 2d 396 (1959), cert. den. 360 U.S. 931 (1959), *Solomon* v. *City of Cleveland*, 20 Ohio App. 19, 159 N.E. 121 (1926), appeal dismissed 116 Ohio St., 739, 158 N.E. 8 (1927), or *Ritholz* v. *Indiana State Board of Registration, etc.*, 45 F. Supp. 423 (N.D. Ind., 1937) support appellee's position. While interstate commerce questions were presented in the *Bedno* and *Ritholz* cases, the factual situations and the questions considered were not at all analogous to appellants' case. No commerce question was involved in the *Solomon* case.

Thus, in the *Bedno* case, the plaintiffs, manufacturers and merchants of optical goods, had a factory in Chicago and branches in several cities, including Milwaukee, Wisconsin. Orders for optical goods taken in Milwaukee were sent to Chicago, where they were filled and returned to Milwaukee. Advertising contracts were made by the plaintiffs in Chicago and all newspaper advertisements were placed from Chicago. Wisconsin law prohibited the price advertising of eyeglasses. Having placed an advertisement in a local Wisconsin paper, the plantiffs sued for a declaratory judgment declaring the law inapplicable to them or unconstitutional and enjoining its enforcement. This relief was denied in all respects.

Aside from the other factual differences, no advertising medium was involved in that case, and the only question

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[5] Had the appellant in *Huron* been convicted for advertising in Detroit the prices at which it would transport goods in interstate commerce, this Court would have had a case more closely analogous to that of appellants here. But no such case would be likely to arise out of the City of Detroit, for even its efforts to restrict the price advertising of eyeglasses have been declared invalid by the Michigan courts as having no relation to public health. *Ritholz* v. *City of Detroit*, 308 Mich. 258, 13 N.W. 2d 283 (1944).

raised relating to interstate commerce was whether Congress had, by 15 U.S.C.A. §52, preempted the field of interstate advertising in the optical industry (95 N.W. 2d 396, 400-401).

As for the *Ritholz* v. *Indiana* case, while the Court stated as a conclusion of law that the sections of Indiana law challenged "are each constitutional and valid and . . . are not . . . in conflict with Clause 3 of Section 8 of Article 1 of the Constitution of the United States", the facts on which this conclusion was based are not analogous to those in our case. There, the plaintiffs did business in a fashion similar to the manner of doing business of the plaintiffs in the *Bedno* case,[6] and no advertising media was a party to the case.[7]

Lastly, in the *Solomon* case, concerning the validity of a Cleveland, Ohio ordinance preventing the vending of papers and periodicals carrying horse racing news or tips on horse racing, while there was an assumption that gambling was illegal in every state, there was no showing that interstate commerce was involved or that an issue relating to it was raised. In view of this, the case is hardly persuasive support on the commerce question.[8]

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[6] Indeed, some of the plaintiffs in each case were apparently the same persons.

[7] See *State ex rel Booth* v. *Beck Jewelry Enterprises*, 220 Ind. 276, 41 N.E. 2d 622 (1942) in which the Indiana Supreme Court narrowly construes the holding in the *Ritholz* case to such an extent that it could not possibly aid appellee here. Compare *Bennett* v. *Indiana State Board of Registration and Examination in Optometry*, 211 Ind. 678, 7 N.E. 2d 977 (1937).

[8] In addition, the court in the *Solomon* case relied on *In re Rapier*, 143 U.S. 110 (1892) and in doing so completely misconstrued its holding and import. In the latter case the defendants were charged with mailing a newspaper containing an advertisement of a lottery in violation of a federal statute prohibiting mailing such matter. Adhering to its earlier decision in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court upheld the government's right to refuse to become an agent, through use of the mails, to the circulation of printed matter it deemed harmful. But in the *Jackson* case, while the Court had held that Congress could deny use of the mails to various materials, including newspapers and pamphlets, the Court held that Congress could not "prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails." (96 U.S. 727, 735) In this context, the *Rapier* case was hardly authority for *Solomon* and the latter is hardly authority for appellee here.

C. New Mexico's enjoining of appellants cannot be justified as a health measure; the danger of retaliatory measures by other states is real.

Aside from the foregoing cases, appellee has two basic arguments under the Commerce Clause, namely, (1) that the statute in issue in this case is an exercise by New Mexico of its police power for the purpose of promoting and protecting the public health of citizens of New Mexico and as such is entitled to special consideration in determining whether it burdens interstate commerce, and (2) that there is little likelihood that the action challenged by appellants will lead to retaliatory measures by other states.

On the latter point it is sufficient to note that future retaliation need not necessarily be by statutes limiting price advertising of eyeglasses. Moreover, it is not necessary that parties such as appellants be victims of all possible retaliation for the threat of retaliation to be sufficient to preclude a state's burdening interstate commerce. In *Edwards* v. *California*, 314 U.S. 160 (1941), Edwards, a California resident, might not have been affected directly by any restrictions that Texas might have placed on travel in retaliation for those imposed by California, but that fact did not prevent this Court from considering the genuinely potential danger raised by California's action or from striking down the California restrictions partly on the basis of that danger (314 U.S. 160, 176).

On the former point, that this is a health statute, it is clear that merely characterising an action as taken pursuant to the police power for protection of public health does not give the action any magical immunity from the proscriptions of the Constitution: "The States cannot use their most characteristic powers to reach unconstitutional results." *Barnes, Natl. Bank* v. *Duncan*, 265 U.S. 17, 21 (1924). See also *Frost Trucking Co.* v. *R. R. Com.*, 271 U.S. 583, 598-599 (1926); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918).

While the Court has, in some cases such as *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960), upheld local enactments aimed at health protection even

though the enforcement of such enactments had some impact on interstate commerce, it has not done so in all cases, despite the usual insistance by the state concerned that the regulation in question was surely directed towards health. We submit that the case of *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935), which appellants quoted and discussed at length on this point in their initial brief (pp. 15-18), puts this argument of appellee in proper perspective. Moreover, as Appellee has conceded that New Mexico citizens may travel to Texas and buy eyeglasses from Roberts (Brief of Appellee, p. 11) and that advertising of Roberts' prices may come into New Mexico from outside and be read and heard by New Mexico citizens (Brief of Appellee, p. 6), it is clear that the statute in question, as applied to appellants, has little if any relation to the public health. It is equally clear that it has no more relation to the public health than did the statute in the *Baldwin* case, and it should be accorded the same treatment.[9]

Aside from all the foregoing, we submit that appellee has wholly failed to make any meaningful distinctions in the cases cited and relied on by appellants in their initial brief, and we again urge that those cases are in point and compelling.

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[9] That it is easy for a state or municipality to find a health basis for practically any restriction it wants to impose is revealed by the following cases: *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (state law forbidding the teaching of foreign language in school held invalid despite "the suggestion that the purpose was to protect the child's health by limiting his mental activities"); *Needham v. Pettit*, 220 Ind. 265, 41 N.E. 2d 606 (1942) (state law prohibiting licensed funeral directors and embalmers from price advertising held unconstitutional); *People v. Osborne*, 17 Cal. App. 2d Supp. 771, 59 P. 2d 1083 (1936) (city ordinance prohibiting certain advertising of barbers' prices held unconstitutional); *Jones v. Bontempo*, 137 Ohio St. 634, 32 N.E. 2d 17 (1941) (state law forbidding price advertising by barbers held unconstitutional). See also *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *Liggett Co. v. Lichtman*, 285 U.S. 262, 278 (1932).

D. The American Optometric Association cannot set the standards of Texas optometrists, and its characterizations of the advertising in question are unjustified.

The AOA also devotes a portion of its brief as *amicus curiae* to the question of whether New Mexico's action unduly burdens interstate commerce. While most of the cases it cites, which include many of those relied on by New Mexico, do not require any detailed analyses or comment, one case must be placed in its proper perspective. The AOA consistently seeks to make too much of this Court's decision in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Thus, the AOA claims that that case "supports a determination here of no violation of the Commerce Clause" because the claimants raised the issue of advertising by newspapers and radio and on this basis claimed violation of the Commerce Clause (Brief of AOA, pp. 44-45). Whether the issue was raised or not, it was not mentioned in either this Court's opinion or that of the lower court,[10] and it is clear that all this Court decided there was that the challenged regulation did not contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment (348 U.S. 483, 488-490).

Moreover, as appellants pointed out in their initial brief (pp. 11-12) the Oklahoma statute in question restricted only advertising by optometrists and specifically exempted from its provision any newspaper or other advertising media (348 U.S. 483, 488, n. 2; 120 F. Supp. 128, 131-132, n. 4), and no advertising media were involved in the case. When, in addition, it is considered that all of the parties in the case were dispensing opticians and ophthalmologists carrying on business and practicing in Oklahoma, it is apparent that the case is no support whatsoever for the position of New Mexico.[11]

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[10] *Lee Optical Co. v. Williamson*, 120 F. Supp. 128 (W.D. Okla., 1954).

[11] Appellee similarly claims too much for the *Williamson* case, but it at least does so in connection with its argument that the challenged action of New Mexico does not deprive appellants of Due Process under the Fourteenth Amendment (Brief of Appellee, pp. 29-31, 33-34). Its argument is equally unsound.

Further, throughout its brief the AOA persists in characterizing Roberts' advertising and price advertising in general as "the practice of the charlatan and the quack" (pp. 12, 24, 42, 47) or "non-professional" (p. 42), or even fraudulent (pp. 35-36). Of course, it is understandable that a trade association such as AOA, one of whose objectives is surely the economic betterment of its member optometrists, would resent competition. But it is not for the AOA to determine the standards of conduct of an optometrist residing and practicing in Texas. That function quite clearly belongs to Texas, and while Texas does regulate the practice of optometry, it does not prohibit truthful price advertising. R. 28; Vernon's Texas Civil Statutes, Art. 4565g; *Shannon* v. *Rogers*, 159 Texas 29, 314 S.W. 2d 810, 816 (1958). Until Texas does so, we submit that it is not for the AOA to say to what standard a Texas optometrist should conform in advertising.

Not only does the AOA persist in this wholly unjustified characterization of Roberts' advertising, it suggests that this Court itself has generally characterized price advertising as the practice of the charlatan and the quack in the case of *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935). This Court did not do so, as a careful reading of the Court's opinion reveals. On pages 611-612 the Court referred to the state court's defining of the policy of the statute in question and quoted the state court's characterizations:

> "The State court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising.' 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work'

was, as a general rule, 'the practice of the charlatan and the quack to entice the public.' " (294 U. S. 608, at 611-612)

As the foregoing reveals, not only was the language relating to the practice of the charlatan and the quack not that of this Court, it did not even relate to price advertising. In this context, the AOA's mischaracterizations are all the more unjustified.[12] We submit that no such characterizations can detract from the essential substance of New Mexico's action. It has unduly burdened interstate commerce by imposing its standards on a Texas optometrist and its imposition, affecting appellants as it does, should not stand.

II.

The admissions of appellee that Roberts can advertise in New Mexico by media situated outside but read or heard in New Mexico show that appellee is discriminating against appellants and this denies them equal protection of the laws.

As appellants noted in their initial brief (p. 39, n. 21), an exemption of out-of-state media disseminating price information in New Mexico from the application of New Mexico's law on price advertising by optometrists would result in an unwarranted discrimination against appellants. This discrimination, which New Mexico now admits, deprives appellants of equal protection of the laws as guar-

[12] The *Semler* case, of course, is not analogous to that of appellants. It simply upheld as valid an Oregon statute providing that a dentists's license could be revoked for various advertising, including price advertising. No issue of interstate commerce and no advertising media were involved.

Aside from these differences, it is to be noted that some courts have noted that there is no real analogy to be made between optometry and dentistry, for optometry is not a learned profession such as medicine, of which dentistry is a branch. See *Rice* v. *Evatt*, 144 Ohio St. 483, 59 N.E. 2d 927, 929, (1945); *Commonwealth* v. *Miller*, 337 Pa. 246, 11 A. 2d 141 (1940); *Matter of Dickson* v. *Flynn*, 246 App. Div. 341 (3rd Dept., 1936), aff'd 273 N.Y. 72 (1937).

anteed to them by the Due Process Clause of the Fourteenth Amendment, and is only one more reason why the challenged injunction should not stand. See *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959 (1927). Compare *State* v. *Packer Corp.*, 77 Utah 500, 297 Pac. 1013 (1931), aff'd. 285 U.S. 105 (1932); *Morey* v. *Doud*, 354 U.S. 457 (1957).

III.

The Federal Communications Act preempts the area into which appellee has intruded in enjoining appellant Permian from broadcasting Roberts' advertising.

A. None of the cases relied on by appellee negate preemption.

On the question of preemption appellee relies mainly on *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Kelly* v. *State of Washington*, 302 U.S. 1 (1937); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945); *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586 (1950); and *Kroeger* v. *Stahl*, 248 F. 2d 121 (3rd Cir., 1957). The *Huron* case, as has already been noted, involved only a partial preemption by federal regulations relating to the safety of vessels, and the same is true of the *Kelly* case. See *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, 155 (1942). While the Court in its opinion in the *Kelly* case did state that there must be a "direct and positive" repugnance or conflict before state action, otherwise valid, is superseded by federal action (302 U.S. 1, 10), the Court was speaking of the conflict between state action and limited federal action, and nothing in the Court's opinion suggests that it intended to abandon those other tests by which preemption is judged.[13]

Similarly, the *Johnson* and *Carroll* cases, which appellants discussed in their initial brief (pp. 31-32), involved situations in no way analogous to that of appellant Per-

[13] As appellants pointed out in their initial brief (p. 21) there are several tests of supersession, of which a conflict between the state and federal regulations is only one. See *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502-505 (1956).

mian. Those cases did not involve regulation in advance of a broadcaster's programming. Here, however, New Mexico has attempted to prohibit Permian from broadcasting certain advertising, thus controlling in advance the content of Permian's programs. The Court in the *Johnson* case upheld the right of the state to adjudicate the claim of fraud in the transfer of a station, and to direct a reconveyance of the lease of the station to the transferor. However, the Court required the State to withhold execution of that portion of its decree requiring transfer of the physical property of the station until steps were ordered to be taken to enable the FCC to deal with new applications for a license in connection with the station (326 U.S. 120, 132). This accommodation of the States' power with respect to fraud to the public interest which led to the granting of the license itself attests to the preemption of the Federal Communications Act.

In both the *Johnson* and *Carroll* cases, the state courts were merely enforcing private rights, which the Court in *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474-475 (1940), had recognized were involved in the ownership of a radio station. But in this case, New Mexico is not attempting to vindicate private rights, but to enforce its own asserted public right directly in conflict with the higher public right implicit in the Federal Communications Act and the broadcasting license of appellant Permian. That New Mexico's public right relates to eyesight does not make the conflict any less real.

The *Kroeger* case involved an attempt by one holding a temporary authorization from the FCC to conduct certain radio tests at a location already zoned as residential. Considering the nature of the authorization, 148 F. Supp. 403, 406, and the fact that the area was already zoned for residential use, that case lends no support to appellee. Appellant Permian does not contend that it need not comply with valid state laws; it only contends that the prohibition on what it can broadcast falls within the area foreclosed to New Mexico regulation. On this point the *Kroeger* case is silent.

B. The existence of other state statutes regulating optometrists is no reason for not finding preemption.

As for the AOA, it too treats the problem of preemption at length (Brief of AOA, pp. 12-37), and in doing so duplicates much of the argument of New Mexico, relying on essentially the same cases.[14] For the most part, therefore, the foregoing discussion will cover the position of the AOA. One particular point must be emphasized, however. In arguing that there is no dominant federal interest justifying the preemption claimed by appellant Permian,[15] the AOA urges that "state regulation of optometric price advertising is in fact fairly uniform," stating that "like New Mexico, thirty-one other states have proscriptions on price advertising of eyeglasses and other optometric materials" (Brief of AOA, p. 22). In fact, many of these statutes are not similar, for they clearly apply only to the person licensed and not to advertising media. For example, just as in the Oklahoma statute involved in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, n. 2 (1955), the Oklahoma statute cited by the AOA has a specific proviso excluding advertising media. And the statutes of Delaware, Hawaii, Minnesota, Missouri, Nevada, Oregon, Pennsylvania, South Dakota and Utah all are aimed not at advertising media but at licensees.

Thus, this argument of the AOA is hardly one of substance. While the Court in the case of *Halter v. Nebraska*, 205 U.S. 34, 39 (1907) did, quite properly, take note of the fact that many states had statutes similar to that under attack, the existence of those statutes was hardly controlling. Moreover, the presence of a number of similar laws in other states did not prevent this Court's

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[14] The AOA does present some imposing lists of cases holding no preemption (Brief of AOA, pp. 16-17). But these are only briefly cited and there is a conspicuous failure to analyze their facts and relate them to those of this case. As to these cases, compare those cases collected in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, at 780-781 (1945).

[15] And by the United States, which has filed a brief stating the position of the Federal Communications Commission that the Federal Communications Act preempts the action taken by appellee.

holding invalid a state statute that forbade the showing of "sacriligious" films. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 521 (1952). Here too the existence of similar statutes is not controlling. On the contrary, as appellants pointed out in their initial brief (p. 20) the existence of the many restrictive advertising laws of the various states, relating not only to advertising by optometrists, but to advertising by many other persons or of many other articles, emphasizes the correctness of appellants' position not only as to preemption[16] but as to the burden on interstate commerce as well.

C. The Court in this case need not define the full extent of the preemption of the Federal Communications Act nor the full extent of the FCC's powers thereunder.

Appellant Permian does claim that the Federal Communications Act is so comprehensive in scope that it must preempt New Mexico's challenged regulation of its broadcasts. But as appellant Permian conceded in its initial brief (pp. 31-33) and as the United States also conceded in its brief (pp. 6-7, 12, 30-31), there are some areas of regulation of broadcasters left to the States.[17] Both appellant Permian (pp. 23-24) and the United States (pp. 12-13, 15) also concede that there are limitations on the power of the FCC.

The positions of appellant Permian and the United States are not identical and appellant Permian does not subscribe to the entire position of the United States. But that there are such differences is not important in this case, for as the United States suggests in its brief at page

[16] On this point see also the Brief of the United States, pp. 25-27.

[17] Appellant Permian obviously could not claim that its manager could not be arrested for the crime of murder merely because this would mean the station would have to shut down. Compare the emphasis placed by both appellee and the AOA on the fact that the state action in both the cases of *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945) and *Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586 (1950) had a serious impact on a broadcast licensee (Brief of Appellee, pp. 16-19, 29; Brief of AOA, p. 36).

34, if the Court should find that the Federal Communications Act preempts the action taken by New Mexico against appellant Permian, the Court need not at the same time define all of the limits or all of the facets of the FCC's power and authority under the Act.

Moreover, we believe that the Court could find that by virtue of Section 326 of the Federal Communications Act, providing that the FCC does not have the "power of censorship over radio communications or signals transmitted by any radio station" and that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication", the authority of the FCC over radio communications and particularly over program content (including advertising) is extremely limited. We believe that the Court could find that the FCC is thus precluded from promulgating definitive regulations stating in advance acceptable program content conforming to a standard conceived by the FCC as acceptable and in the public interest. See *Farmers Union* v. *WDAY*, 360 U.S. 525, 529-530 (1959).[18] But we submit that it is not essential

[18] Even in such event, which would be consistent with the intent of Congress and the requirements of the Free Speech and Free Press provisions of the First Amendment, the Court could still find that the Federal Communications Act foreclosed New Mexico's action. On this point we submit that the statement of the Court of Appeals in *Allan B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 156 (3rd Cir., 1950), cert. den. 340 U.S. 929 (1951), quoted at pages 23-24 of appellants' initial brief, to the effect that the proscriptions of Section 326 on the authority of the FCC, in an otherwise comprehensive statutory regulation, did not open up the field for state censorship is correct. Despite the suggestions of New Mexico and AOA, it is not essential that there be some censorship.

In this regard, the appellee appears to suggest that a little censorship by it of the broadcasting of appellant Permian is all right, for at page 24 of its brief it states as follows:

"The New Mexico provisions against price advertising *are not directed against broadcasting as such, as was true in Dumont.* They do not constitute a wholesale scheme of censorship. Their effect on the broadcaster is only incidental." (emphasis appellee's)

But that New Mexico's action is not a "wholesale scheme of censorship" does not save it, for it is clearly a regulation of appellant Permian's broadcasting and this, we submit, is an area foreclosed to New Mexico.

to a finding of preemption in this case that the Court spell out these various limits or the limits of the specific areas left to state regulation.

IV.

Appellee's arguments fall far short of justifying the deprivation of appellants' property without due process of law.

A. Appellees' injunction deprives appellants of due process by denying to them freedom of the press and appellants should be allowed to present the issue to this Court.

Appellants in their initial brief asserted that the challenged action of New Mexico deprived them of their property without due process of law in violation of the Fourteenth Amendment in two respects, one based on freedom of the press and the other based on the fact that the action in question bore no reasonable relation to the end sought to be achieved. As to the former, appellee protests that appellants are now trying to raise a question not raised below (Brief of Appellee, pp. 31-32). In appellants' initial brief it was pointed out that there might be some question about this (p. 34, n. 18). We submit, however, that the question of freedom of the press was properly raised below and in appellants Jurisdictional Statement, although never fully articulated, for Freedom of the Press as protected by the First Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. We submit that the raising of the issue of a denial of due process below fairly comprised the issue of freedom of the press and that we should be allowed to present the question to this Court.

While the New Mexico Supreme Court did not specifically mention freedom of the press, we submit that its opinion leaves no doubt but that it considered that the injunction was valid and did not deprive appellants of due process (R. 51) and that further articulation of constitutional objections would not have resulted in a different decision. Under these circumstances appellants urge that the Court consider this issue. See *Braniff Airways* v. *Ne-*

braska Board, 347 U.S. 590, 597-599 (1954); *Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *St. Louis I. Mt. & So. Ry. Co.* v. *Starbird*, 243 U.S. 592, 598 (1917).

No case cited by either appellee or the AOA in any way detracts from the soundness of both of appellants' due process arguments. With regard to freedom of the press, appellee cites only *Lorain Journal* v. *United States*, 342 U.S. 143 (1951), which was a federal antitrust case and not remotely in point. The AOA, on the other hand, does claim that commercial advertising is not protected by the due process clause,[19] citing essentially the same cases cited by appellants in their initial brief (Brief of AOA, pp. 46-48; brief of appellants, pp. 33-38).

Appellants have always admitted that the advertising in question was purely commercial in nature. But it was advertising disseminated by media whose business it is to disseminate information other than commercial advertising. Even advertising, as we set forth in our initial brief, may be of a more or less commercial nature and it may convey information of interest to the general public even though it is commercial (pp. 37-38). The Court has recognized that the constitutional protection for a free press does not apply only to the exposition of ideas, *Winters* v. *New York*, 333 U.S. 507, 510 (1948), and that freedom of speech and the press does not bear "an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California*, 314 U.S. 252, 269 (1941).

While this Court has limited the constitutional protections afforded to commercial material disseminated in various ways, *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949) (advertising on trucks); *Cusack* v. *City of Chicago*, 242 U.S. 526 (1917) (advertising on billboards); *Valentine* v. *Christensen*, 316 U.S. 52 (1952) (distribution of commercial handbills), it has never yet limited the constitutional protections afforded to commercial mate-

[19] The AOA also suggests that appellants cannot be right on "both the First Amendment and preemption questions". (Brief of AOA, p. 15, n. 4). We submit, as we have already discussed, that appellant Permian can be right on both questions.

rial disseminated as an integral part of a newspaper or radio broadcast.[20] We submit that just as in such cases as *Martin* v. *Struthers*, 319 U.S. 141 (1943), *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) and *Jamison* v. *Texas*, 318 U.S. 413 (1943), the broadcasts and newspapers of appellants are partly commercial[21] and partly non-commercial and that their entire dissemination should be free from the restraints imposed by appellee.

B. Appellees injunction deprives appellants of due process in that enjoining appellants from disseminating advertising of a Texas optometrist bears no real or substantial relation to New Mexico's claimed objective of protecting the health of its citizens.

The action of New Mexico in enjoining appellants from disseminating the price advertising of Roberts, a Texas optometrist, deprives appellants of their property in yet another way. The standard to which a state regulation must conform is that the action undertaken must not be unreasonable, arbitrary or capricious and must have a real and substantial relation to the end sought to be achieved. *Nebbia* v. *New York*, 291 U.S. 502, 525 (1934); *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147, 162 (1939). See also *Bates* v. *Little Rock*, 361 U.S. 516, 524-527 (1960).

Assuming generally that the claimed object of appellee, namely the protection of the health of New Mexico citizens, is a proper object for the exercise of its police power, we nevertheless submit that the means chosen by appellee bear no reasonable relation to the object sought to be at-

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[20] The argument of the AOA that the Federal Trade Commission has a "familiar" history of cease and desist orders against deceptive and misleading advertisements is not in point (Brief of AOA, p. 47). The AOA conspicuously fails to cite any case in which the FTC has issued such orders against advertising media such as appellants.

[21] That a suppressed expression is part of a commercial endeavor conducted for private profit does not preclude its protection under the freedom of speech and press of the First Amendment as incorporated into the Fourteenth Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-502 (1952). Compare *Breard* v. *Alexandria*, 341 U.S. 622, 641-643 (1951).

tained and are in fact unreasonable, arbitrary and capricious. New Mexico has admitted that it is not attempting to prevent its citizens from traveling to Texas to purchase eyeglasses from Roberts and that they are free to read or hear price advertisements of Roberts sent into New Mexico by media situated outside (Brief of appellee, pp. 6, 11). Its statute, then, is only aimed at preventing its citizens from learning of Roberts prices.

This cannot be a permissible objective, for if citizens of New Mexico have a right to travel to Texas to purchase eyeglasses from Roberts, they have a right to learn that he is there. Any other conclusion could not be squared with *Edwards* v. *California*, 314 U.S. 160 (1941). Therefore, the means selected to achieve this objective must of necessity fall as they apply to appellants.

Further, even if it be assumed that this limited objective be permissible, we submit that enjoining appellants from disseminating Roberts' advertising is an unreasonable and arbitrary means of accomplishing the objective. This injunction not only forecloses such information to New Mexico citizens, but to Texas and other states' citizens as well, and it places on the appellants an unwarranted burden of ascertaining state laws. If appellant Head must know whether advertisers who may seek to place advertisements in her paper are lawfully entitled to do so under the particular state statutes regulating their professional, business or other conduct in every state in which she may have circulation, it is clear that she must forego acceptance of much out-of-state advertising or bear a disproportionate expense in informing herself of the laws of these states. The same is true as to appellant Permian, though to a more limited extent because it broadcasts only in two states.

We submit that thus burdening appellants deprives them of their property without due process. See *Edwards* v. *California*, *supra*, at page 176, where the Court emphasized the virtual impossibility for migrants and those transporting them to acquaint themselves with the peculiar

rules of admission of many states. And see also *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939), where the Court emphasized that other more obvious means for preventing the littering of streets than absolutely prohibiting distribution of handbills were available. We submit that here too other more obvious means are available to appellee to accomplish such objectives in the regulation of optometry in New Mexico as are proper, and we urge that appellee be left to those.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of New Mexico should be reversed and the injunction against appellants dissolved and the action dismissed on the merits.

Respectfully submitted,

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